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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202

STONEPRIDE FINANCIAL CORPORATION, a Colorado corporation; MONEY NOW, INC., a Colorado corporation; PINK PELICAN, INC., a Colorado corporation; BPCM HOLDINGS, LLC, a Colorado limited liability company; PAYDAY EXPRESS, LTD., a Colorado corporation; McCORMICK & ARTELLE, INC., a Colorado corporation; FLAGSTICK INVESTMENT CORPORATION, a Colorado corporation; CASH N ADVANCE III, INC., a Colorado corporation; and CASH N ADVANCE IV, INC., a Colorado corporation,

Plaintiffs,

v.

JOHN W. SUTHERS, ATTORNEY GENERAL OF THE STATE OF COLORADO, and LAURA E. UDIS, ASSISTANT ATTORNEY GENERAL and ADMINISTRATOR OF THE COLORADO UNIFORM CONSUMER CREDIT CODE,

Defendants.</td><td>▲ COURT USE ONLY ▲</td></tr>
<tr><td></td><td>Case No. 2010CV9992
Courtroom 376</td></tr>
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THIS MATTER comes before the Court on Plaintiffs' Motion for Preliminary Injunction, filed on March 18, 2011. Pursuant to agreement of the parties, Plaintiffs' Motion and the final hearing/trial on the merits in this case were consolidated and heard by the Court on July 22, 2011. The Court has considered the evidence and arguments presented by the parties at the hearing, the rulemaking record, the entire file in the case, and applicable legal authorities.

The Court, being fully advised in this matter, hereby FINDS, CONCLUDES, and ORDERS, as follows.

Background

This case involves judicial review of agency rulemaking pursuant to § 24-4-106 of the State Administrative Procedure Act, § 24-4-101, *et seq.*, C.R.S. 2010 (APA). Plaintiffs are several payday lenders. They brought this suit against defendants, the Attorney General and the Administrator of the Uniform Consumer Credit Code, challenging a rule – Uniform Consumer Credit Code Rule 17 (I)(2), 4 Code Colo. Reg. 902-1 (Rule 17(I)(2) or the Rule) – that implements House Bill 10-1351 (HB 1351). HB 1351, in turn, amended portions of the Uniform Consumer Credit Code, § 5-1-101, *et seq.*, C.R.S. 2010 (Code).

Plaintiffs' Complaint for Judicial Review of Agency Action under the State Administrative Procedure Act, for Declaratory Judgment and for Injunctive Relief, dated December 29, 2010 (Complaint), contains five claims for relief. The first three claims allege specific ways in which plaintiffs claim the Rule is invalid: (a) the Administrator violated APA § 24-4-103(8)(b) by adopting the Rule before the Attorney General issued an opinion on the Rule (First Claim for Relief); (b) in adopting the Rule, the Administrator ignored rules of statutory construction and otherwise misinterpreted HB 1351 and, therefore, the Rule is arbitrary and capricious, an abuse of discretion, an erroneous interpretation of the law, and is otherwise contrary to law (Second Claim for Relief); and (c) the Administrator enforced the Rule prior to the Rule's effective date and her actions in doing so were arbitrary, capricious, an abuse of discretion, and contrary to law (Third Claim for Relief).

The remaining two claims for relief are derivative of the first three claims. The Fourth Claim for Relief seeks a declaratory judgment that the Rule is invalid and a corresponding declaration as to what plaintiffs assert should be the correct interpretation of HB 1351. The Fifth Claim for Relief seeks an injunction postponing the Rule's effective date and enjoining the Administrator's enforcement of the Rule.

Findings of Fact

Each of the Plaintiffs is licensed as a supervised lender under the Colorado Uniform Consumer Credit Code, C.R.S. § 5-1-101, et seq. (the "UCCC") and is engaged in the business of making payday loans.

Defendant Laura E. Udis (the "Administrator") is the Administrator of the UCCC, pursuant to the provisions of C.R.S. § 5-6-103.

The provisions of the UCCC applicable to payday loans are contained in the Deferred Deposit Loan Act, C.R.S. § 5-3.1-101, *et seq.* (the "DDLA"), Article 3.1 of the UCCC.

During the 2010 legislative session, the General Assembly enacted HB 1351. This act became effective August 11, 2010.

Among other things, HB 1351 amended Code § 5-3.1-105, concerning the finance charges a lender could charge in connection with payday loans. In particular, HB 1351 allowed a payday lender to charge three different types of finance charges: (1) what the parties refer to as an origination fee, which is a tiered percentage of the loan's principal amount; (2) a 45% interest rate; and (3) a monthly maintenance fee. It also called for a pro rata refund of the "annual percentage rate" in the event a loan is paid off early.

On June 18, 2010, the Administrator issued "Administrative Interpretation – House Bill 10-1351 Concerning the Maximum Authorized Interest Rate for a Payday Loan" (the "June 18th Interpretation"), which addressed implementation of the new law and related compliance issues in a question and answer format.

In Question and Answer No. 12 of the June 18th Interpretation, the Administrator held that all fees and charges assessed in connection with a deferred deposit loan under the provisions of the DDLA as amended by HB 1351 were subject to rebate upon prepayment in full, as follows:

> 12. *If a consumer prepays a payday loan before the end of the loan term, what fees must be refunded?*
> All fees and charges are subject to refund upon prepayment. HB 1351 amended § 5-3.1-105 provides that: "If the loan is prepaid prior to the maturity of the loan term, the lender shall refund to the consumer a prorated portion of the annual percentage rate based upon the ratio of time left before maturity to the loan term." Under HB 1351, the APR is calculated pursuant to the federal Truth in Lending Act and includes all fees and the finance charge associated with the loan, with certain exceptions not applicable here. [9] Consequently, the current DDLA's finance charge (20%/7.5%), the 45% interest rate, and any unearned monthly maintenance fees [10] must be refunded upon prepayment.[11]
> [9] Amended DDLA, § 5-3.1-103(1.5) in HB 1351.
> [10] There should be no unearned monthly maintenance fees as the fee is earned at the end of each month after the initial 30 days.
> [11] Current DDLA § 5-3.1-105 states that the finance charge (20% of the first $300 loaned and 7.5% of the amount loaned in excess of $300) "shall be deemed fully earned as of the date of the transaction." This language was not repealed by HB 1351. To the extent that it conflicts with the amended language in that section now requiring a refund of the pro-rated portion of the APR upon prepayment, the language of HB 1351 is the more recent legislative enactment on this issue. If the legislative intent was to refund only the 45% interest on prepayment, "interest rate" rather than "annual percentage rate" would have been used. (footnotes in original.)

On July 29, 2010, thirteen days prior to the effective date of the amendments to the DDLA made by HB 1351, the Administrator issued a "Revised Administrative Interpretation – House Bill 10-1351 Concerning the Maximum Authorized Interest Rate for a Payday Loan" (the "Revised July 29th Interpretation").

In the Revised July 29th Interpretation, the Administrator changed her position regarding the fees and charges subject to rebate upon prepayment under the amendments to the DDLA made by HB 1351. In Question and Answer No. 12 of the Revised July 29th Interpretation, the Administrator opined that any unearned portion of the 45% interest rate was subject to rebate upon prepayment in full, but that the finance charge (origination fee) authorized under existing law (20%/7.5%) was not subject to rebate upon prepayment in full.

> 12. *If a consumer prepays a payday loan before the end of the loan term, what fees must be refunded?*
> Upon prepayment in full by the consumer, the lender must refund any unearned portion of the 45% interest rate calculated on a pro-rata method. The refund may not be calculated on the actuarial method. The current DDLA's finance charge (20%/7.5%) need not be refunded. Any unearned monthly maintenance fees must be refunded upon prepayment.[9] Refund examples are provided at the end of this interpretation.
> Amended § 5-3.1-105 in HB 1351 provides that: "If the loan is prepaid prior to the maturity of the loan term, the lender shall refund to the consumer a prorated portion of the annual percentage rate based upon the ratio of time left before maturity to the loan term." The bill also added a definition of "annual percentage rate" that includes "all finance charges" and retained the pre-HB 1351 language that the current finance charge (20%/7.5%) is "deemed fully earned as of the date of the transaction." This resulting conflict could reasonably be interpreted to mean that upon prepayment all fees, including the current finance charge, must be refunded or that only the 45% rate of interest must be refunded. The conflict was not rectified by the legislature in the remaining debate and voting on the bill. The Administrator initially determined that all fees were subject to refund on prepayment. However, the Administrator recently learned that those involved in crafting the language resulting in the Revised [sic] version of the bill likely believed that only the 45% rate of interest was subject to refund. Consequently, this revised interpretation is issued.
> [9] There should be no unearned monthly maintenance fees as the fee is earned at the end of each month after the initial 30 days. (footnote in original.)

On July 30, 2010, the Administrator commenced formal APA rulemaking proceedings to implement HB 1351 and its amendments to Code § 5-3.1-105. One of the proposed rules, which later became Rule 17(I)(2), concerned whether the origination fee was refundable if the consumer paid off the loan prior to maturity.

On August 31, 2010, the Administrator, together with the Code's Council of Advisors, conducted a rulemaking hearing. At the conclusion of the hearing, a duly appointed Council of Advisors' subcommittee adopted various rules, including Rule 17(I)(2). As here pertinent, this Rule requires a lender to refund a pro-rata portion of the origination fee if the consumer pays off the loan prior to maturity.

On September 2, 2010, the Administrator submitted the rules to the Attorney General for a rule opinion. On September 9, 2010, the Attorney General issued his rule opinion. On September 10, 2010, the Administrator submitted the rules, together with the Attorney General's opinion, to the Secretary of State and Office of Legislative Legal Services. The Secretary of State published the rules on September 25, 2010. The rules, including Rule 17(I)(2), became effective on November 29, 2010.

On September 3, 2010, the Administrator sent to interested parties, including payday lenders, a memorandum advising them of the newly-adopted rules. This did not constitute issuing the Rule before submitting it for the Attorney General's opinion.

On September 23, 2010, the Administrator sent to interested parties, including payday lenders, a memorandum advising them that the rules adopted on August 31 invalidated any prior interpretations of HB 1351 and that, therefore, after August 31 they could not rely on those prior interpretations in complying with HB 1351. This was not an enforcement policy or action and did not constitute enforcement of the Rule before its effective date.

Conclusions of Law

C.R.S.§ 5-3.1-105, concerning the authorized charges and fees for a payday loan, as amended by HB 1351, reads as follows:

> **5-3.1-105. Authorized** ~~finance charge~~ **INTEREST RATE.** A lender may charge a finance charge for each deferred deposit loan OR PAYDAY LOAN that may not exceed twenty percent of the first three hundred dollars loaned plus seven and one-half percent of any amount loaned in excess of three hundred dollars. Such charge shall be deemed fully earned as of the date of the transaction. THE LENDER MAY ALSO CHARGE AN INTEREST

> RATE OF FORTY-FIVE PERCENT PER ANNUM FOR EACH DEFERRED DEPOSIT LOAN OR PAYDAY LOAN. IF THE LOAN IS PREPAID PRIOR TO THE MATURITY OF THE LOAN TERM, THE LENDER SHALL REFUND TO THE CONSUMER A PRORATED PORTION OF THE ANNUAL PERCENTAGE RATE BASED UPON THE RATIO OF TIME LEFT BEFORE MATURITY TO THE LOAN TERM. IN ADDITION, THE LENDER MAY CHARGE A MONTHLY MAINTENANCE FEE FOR EACH OUTSTANDING DEFERRED DEPOSIT LOAN, NOT TO EXCEED SEVEN DOLLARS AND FIFTY CENTS PER ONE HUNDRED DOLLARS LOANED, UP TO THIRTY DOLLARS PER MONTH. THE MONTHLY MAINTENANCE FEE MAY BE CHARGED FOR EACH MONTH THE LOAN IS OUTSTANDING THIRTY DAYS AFTER THE DATE OF THE ORIGINAL LOAN TRANSACTION. The lender shall charge only those charges authorized in this article in connection with a deferred deposit loan.

[Capital letters indicate new material added by HB 1351 to the existing statute; dashes through words indicate words deleted by HB 1351 from the existing statute.]

Code § 5-3.1-105 provides that the origination fee is “fully earned.” It also provides that, should a consumer pay off the loan prior to maturity, the lender must refund to the consumer a prorated portion of the loan’s “annual percentage rate” (APR). Annual percentage rate is a defined term. The origination fee finance charge is one component of the loan’s APR, the others being the 45% interest rate and the monthly maintenance fee finance charges. *See* Code § 5-3.1-102(1.5). The definition of annual percentage rate was among the code amendments contained in HB 1351; it was not previously a defined term.

The central dispute between the parties is whether the origination fee is included in the annual percentage rate for purposes of determining the amount that must be refunded in the event of prepayment of the loan before maturity. Plaintiffs concede, as they must, that the Court cannot rule in their favor on this pivotal point without disregarding the definition of annual percentage rate adopted in the same piece of legislation. They argue that the Court should disregard the definition in this instance because it is in direct conflict with the statute’s immediately preceding statement that the origination fee is “fully earned,” which they say means “non-refundable.” However, there are two other instances in the Code in which a finance charge is both fully earned and refundable. C.R.S. §§ 5-2-214(4); 5-3.1-105 and 5-3.1-108(2). With HB 1351, the legislature added a third such instance. The concepts of fully earned and refundable, as used by the legislature in the Code, are not mutually exclusive.

The Court concludes that, applying the statutory definition of the crucial term, “annual percentage rate,” the language at issue is clear and unambiguous and must be applied by the Court as it was written by the legislature. It includes the origination fee as well as the interest rate and the maintenance fee – all applicable finance charges. It follows that the Rule, which applies and explicates this correct interpretation of the statute, is valid. This case presents none of the extraordinary circumstances that might allow a Court to disregard clear statutory language. If, as Plaintiffs argue, the legislature simply made a mistake, using "annual percentage rate" where it meant to say "interest rate," it is for the legislature to correct the mistake.

Even if the language of the statute were ambiguous, the result of the analysis would be the same.

An agency's rules are presumed valid, and the party challenging a rule "has a heavy burden to establish" the rule's invalidity. *Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 217 (Colo. 1996). A reviewing court may not substitute its judgment for that of the agency. *See id.*

Further, an agency's interpretation of the statute it is charged to enforce is entitled to deference, *see, e.g., Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246, 1254 (Colo. 1998); *Udis v. Universal Communications Co.*, 56 P.3d 1177, 1179 (Colo. App. 2002); and must be upheld unless "clearly in error." *E.R. Southtech, Ltd.* v. *Arapahoe County Bd. of Equalization*, 972 P.2d 1057, 1059 (Colo. App. 1998). This is especially so if the statute is ambiguous. *See*, *e.g.*, *Colo. State Bd. of Accountancy v. Paroske*, 39 P.3d 1283, 1286 (Colo. App. 2001) (where statute is susceptible of more than one interpretation, and agency has employed its expertise in selecting a particular interpretation, court "must defer to the agency's interpretation"); *Mile High Greyhound Park v. Colo. Racing Comm'n*, 12 P.3d 351, 353-354 (court may not substitute its own construction in place of agency's reasonable construction of ambiguous statute; agency's interpretation is entitled to "great weight").

As previously discussed, there is nothing inconsistent with a particular finance charge being "fully earned" and also being "refundable." The Court notes, too, that during the debate on HB 1351, the General Assembly defeated an amendment that would have made the origination fee expressly non-refundable. *See* R. 243, 327-330. It also defeated a later bill, HB 11-1290, and a version of SB 11-78, both of which would have legislatively abrogated Rule 17(I)(2). Thus, had the General Assembly wanted to make the origination fee non-refundable, it knew how to do so but did not.

Thus, even if Code § 5-3.1-105 were ambiguous, the Rule would be a proper interpretation of it, to which the Court defers and with which it agrees. The Rule is supported by the rulemaking record. In promulgating and adopting the Rule, the Administrator and Council of Advisors' subcommittee properly exercised their discretion.

Plaintiffs also argue that the Rule is void because the Administrator did not comply with the APA. Although only substantial compliance with the APA's rulemaking procedures are required, *see* APA § 24-4-103(8.2)(a); *Brighton Pharmacy, Inc. v. Colo. State Pharmacy Bd.*, 160 P.3d 412, 415 (Colo. App. 2007), here, the Administrator complied fully with all aspects of these procedures. In particular, she did not "issue" the Rule prior to submitting it to the Attorney General for an opinion, and therefore did not violate APA § 24-103(8)(b).

Plaintiffs also argued that, even if the Rule is valid, the Administrator is not applying it properly in communications with the industry and they are, therefore, at risk of improper enforcement. This issue was disposed of at the hearing, with the Court finding that, because no enforcement actions have been taken by the Administrator and because any such actions that are taken in the future must be addressed in the administrative process, Plaintiffs' allegations about risk of improper enforcement are not ripe for judicial review.

Order

The Court, therefore, ORDERS that the Complaint be, and hereby is, DISMISSED in its entirety, with prejudice. Defendants are awarded their costs.

Dated: Denver, Colorado
August 4, 2011

BY THE COURT:

Catherine A. Lemon

District Court Judge